

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

RAMUNNO & RAMUNNO, P.A., :  
 : C.A. No. N14C-12-077 WLW  
Plaintiff, :  
 :  
v. :  
 :  
STEPHEN B. POTTER and :  
POTTER CARMINE & :  
ASSOCIATES, P.A., :  
 :  
Defendants. :

Date Submitted: November 12, 2015  
Date Decided: February 24, 2016

**ORDER**

Upon Defendants' Motion to Dismiss  
*Denied.*

L. Vincent Ramunno, Esquire of Ramunno & Ramunno, P.A., Wilmington, Delaware;  
attorney for Plaintiff.

Stephen B. Potter, Esquire and Tiffany A. Anders, Esquire of Potter Carmine &  
Associates, P.A., Wilmington, Delaware; attorneys for Defendants.

WITHAM, R.J.

Defendants Stephen B. Potter and Potter Carmine & Associates, P.A. (collectively, “Potter”) move this Court to dismiss the complaint of Plaintiff Ramunno & Ramunno, P.A. (“Ramunno”) pursuant to Superior Court Civil Rule 12(b)(6) for failure to state a claim upon which relief may be granted. For the following reasons, Defendants’ motion to dismiss is DENIED.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Each count in this two count case involves separate clients and independent causes of action. In each cause of action, both Potter and Ramunno were retained by the client at one point during the proceedings. Count I involves a complaint filed by Bertha Flores (“Flores”) relating to two accidents in which she was involved. The first accident occurred on February 24, 2010, and the second on May 17, 2011. Flores initially retained Ramunno to represent her in both accidents, but later discharged the firm and retained Potter. Potter negotiated a settlement with the insurance company for both accidents. Ramunno claims he sent a “voluminous file” to Potter. Potter claims Ramunno failed to provide a translator for an arbitration hearing which then had to be rescheduled, and that led Flores to discharge Ramunno and seek new counsel. Ramunno seeks compensation for work performed on the Flores case under the theory of quantum meruit.

Count II involves a complaint filed by Roblisha Smith relating to the death her mother. Her mother, Mary Smith, was involved in a police chase auto accident on October 2, 2014 and passed away on October 3, 2014. On October 7, 2014, Potter was retained by Roblisha Smith, and settlements with two insurance carriers were

rapidly reached. On October 16, 2014, a settlement was reached with the at fault driver's insurance carrier for the policy limit of \$15,000, and on October 24, 2014, a settlement was reached with the underinsured motorist carrier for the policy limit of \$25,000. On November 12, 2014, Roblisha Smith retained Ramunno. Francis J. Bass, an employee of Ramunno, was appointed the personal representative of the estate of Mary Smith. Ramunno made a claim to the proceeds for the estate, but the insurance carrier refused to tender a check because of the competing claims of Potter and Ramunno. Ramunno seeks compensation for fees owed in the Smith case.<sup>1</sup>

Potter's amended answer of January 15, 2015 contained a counterclaim against Ramunno. The counterclaim consisted of two counts and asked the Court to rule in Potter's favor in the main action. Because the counterclaim made no request other than a decision in Potter's favor in the main action, the counterclaim will be treated as an expanded answer. In Count I, Potter denies that Ramunno was discharged without cause, and in Count II, Potter claims there was a proper contingency fee agreement with Roblisha Smith as the sole heir of Mary Smith. On July 13, 2015, Ramunno filed an amended complaint. The amended complaint added a claim under Count II stating that the administrator had allowed Potter to hold \$8,333.33 of the insurance disbursement on the express condition that it be held in escrow pursuant to Rule 1.15 of the Delaware Lawyers' Rules of Professional Conduct. Potter's July 30, 2015 answer to the amended complaint denied the added claim.

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<sup>1</sup> An objective observer would expect close coordination and cooperation be required by the two firms.

On October 30, 2015, Potter filed this motion to dismiss.

### **STANDARD OF REVIEW**

“Delaware is a notice pleading jurisdiction. Thus, for a complaint to survive a motion to dismiss, it need only give general notice of the claim asserted.”<sup>2</sup> When deciding a motion to dismiss under Superior Court Rule of Civil Procedure 12(b)(6), all well-pleaded allegations in the complaint must be accepted as true.<sup>3</sup> The test for sufficiency is a broad one: the complaint will survive the motion to dismiss so long as “a plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint.”<sup>4</sup> However, the Court “will not accept conclusory allegations unsupported by specific facts or [] draw unreasonable inferences in favor of the non-moving party.”<sup>5</sup> Stated differently, a complaint will not be dismissed unless it clearly lacks factual or legal merit.<sup>6</sup>

### **DISCUSSION**

The personal and confidential nature of the attorney-client relationship gives every client the right to terminate an attorney’s services with or without cause.<sup>7</sup> The

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<sup>2</sup> *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005) (internal citations omitted).

<sup>3</sup> *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

<sup>4</sup> *Id.* (citing *Klein v. Sunbeam Corp.*, 94 A.2d 385 (Del. 1952)).

<sup>5</sup> *Price v. E.I. DuPont de Nemours & Co.*, 26 A.3d 162, 166 (Del. 2011) (quoting *Clinton v. Enterprise Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009)).

<sup>6</sup> *Diamond State Tel. Co. v. Univ. of Del.*, 269 A.2d 52, 58 (Del. 1970).

<sup>7</sup> *Webb v. Harleysville Ins. Co.*, 1995 WL 716757, at \*3 (Del. Super. Oct. 23, 1995). *See also* Del. Lawyer’s R. Prof’l Conduct 1.16, cmt. 4.

nature of the termination will determine whether the attorney who has been terminated is entitled to recover fees for services provided. “The prevailing rule in a contingent fee case where an attorney is discharged without cause is that recovery for attorney fees is limited to quantum meruit.”<sup>8</sup> A recovery under quantum meruit is limited to an amount not to exceed the contingency fee.<sup>9</sup> If there is no recovery, or if an attorney was discharged for cause, the attorney is not entitled to a fee.<sup>10</sup> In *Webb v. Harleysville Insurance Co.*, the Court identified ten factors to be considered in a quantum meruit analysis:

- 1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- 2) The likelihood, if apparent to the client, that the substance of the particular employment will preclude other employment by the lawyer;
- 3) The fees customarily charged in the locality for similar legal services;
- 4) The amount involved and the results obtained;
- 5) The time limitations imposed by the client or by the circumstances;
- 6) The nature and length of the professional relationship with the client;
- 7) The experience, reputation, and ability of the lawyer or lawyers to perform the services;
- 8) Whether the fee is fixed or contingent;
- 9) The employer’s ability to pay; and
- 10) Whether claimant’s counsel has received or expects to receive compensation from any other source.<sup>11</sup>

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<sup>8</sup> *Webb*, 1995 WL 716757, at \*3.

<sup>9</sup> *Ramunno & Ramunno, P.A. v. Gary S. Nitsche, P.A.*, 2009 WL 395224, at \*1 (Del. Super. Feb. 2, 2009).

<sup>10</sup> *Gary S. Nitsche, P.A.*, 2009 WL 395224, at \*2.

<sup>11</sup> *Webb*, 1995 WL 716757, at \*3.

“Additional compensation, reflecting the contingent nature of the case, may be warranted when questions involved are novel or difficult, the outcome doubtful, and the result significant.”<sup>12</sup>

Because the nature of the termination determines whether an attorney is entitled to compensation, “a factual determination must be made by the Court to determine whether or not the attorney has been terminated with or without cause.”<sup>13</sup> Courts may look to the Delaware Lawyers’ Rules of Professional Conduct to determine whether an attorney has been discharged for cause. A lawyer must act with diligence, provide competent legal representation, follow the decisions of his client concerning objectives of representation, keep the client duly informed, and give honest advice.<sup>14</sup>

### **Count I: The *Flores* Case**

The disposition of the first count hinges on whether Ramunno was discharged for cause. In this case, Potter claims Ramunno was discharged for cause after failing to supply a translator for an arbitration hearing. Ramunno disputes the claim and states he provided a voluminous file to Potter. A single instance of failing to supply a translator for an arbitration hearing, with nothing more, does not rise to a violation of the Rules of Professional Conduct sufficient to hold that Ramunno was discharged for cause. Thus, the Court cannot rule that Ramunno is not entitled to a claim on the

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<sup>12</sup> *Id.*

<sup>13</sup> *Murrey v. Shank*, 2011 WL 4730549, at \*3 (Del. Super. Aug. 30, 2011).

<sup>14</sup> *Id.* (citing Del. Lawyer’s R. Prof’l Conduct).

proceeds of the *Flores* case.

Potter cites *Hercules, Inc. v. Tomaszewski* for the proposition that a plaintiff may only bring a claim of quantum meruit if the plaintiff performed services with the expectation that the *defendant* would pay for those services.<sup>15</sup> Potter argues that because Ramunno did not allege the firm performed services with the expectation that Potter would pay, Ramunno cannot bring a claim in quantum meruit against Potter. Potter claims that Ramunno performed his services with the expectation that Flores would pay, and that Potter was not in the picture when Ramunno performed its services. Potter makes an additional claim that Delaware courts have yet to address the issue of whether a claim by a discharged attorney may be brought directly against the subsequent attorney. He claims that in *Webb*, the discharged attorney filed an intervenor action and the question of whether the attorney was discharged for just cause was properly addressed by the party that discharged the attorney. In *Webb*, the intervenor action allowed the parties to settle the fee dispute before funds were dispersed. However, Potter also cites *Gary S. Nitsche, P.A.* for the same proposition. Here, the plaintiff sought to recover attorney's fees in twelve cases where he initially represented clients that were subsequently represented by the defendant. The discharged attorney sued the subsequent attorney directly. Thus, the courts have allowed claims of quantum meruit against someone other than the person for whom the services were performed, and more specifically have allowed an action by a discharged attorney that was brought directly against the subsequent attorney for

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<sup>15</sup> *Hercules, Inc. v. Tomaszewski*, 2011 WL 6951839, at \*4 (Del. Com. Pl. Dec. 29, 2011).

recovery of fees based on quantum meruit.

### **Count II: The *Smith* Case**

In Count II, Ramunno seeks compensation for fees owed in the *Smith* case. Potter claims he reached a settlement with the insurance companies based on a wrongful death claim on behalf of Roblisha Smith, “the sole beneficiary of the estate and the only wrongful death claimant.” Potter then states that “[t]he only work Ramunno claims it accomplished, in the *Smith* case, was opening the estate of Mary Smith. Ramunno chose to take a case which was already settled . . . .” Ramunno claims they opened the estate for Mary Smith, and were therefore the proper party to pursue the insurance claims.

The dearth of information prevents a clear and concise understanding of the actions and expectations of the parties. The Court is left to guess as to the intent of the parties, representations made to the client, and the diligence of the parties in representing Roblisha Smith. For instance, the following questions may or may not be pertinent to this dispute, but could be helpful:

- Potter stated he settled a wrongful death claim for Roblisha Smith, *the sole beneficiary of the estate* and the only wrongful death claimant. Potter’s claim that Roblisha Smith was the sole beneficiary of the estate would lead the Court to believe he also represented the estate, yet an estate was never opened. Did Roblisha Smith intend the settling of her mother’s estate to be part of the retainer agreement?
- Mary Smith apparently survived for a period of time after the accident

occurred, which indicates that the estate may be entitled to bring a survivor action for pain and suffering.<sup>16</sup> Did Potter inform Roblisha Smith of the financial implications of filing a survivor action versus a wrongful death claim?

- A person named Irene Smith was mentioned in the deposition of Francis J. Bass, Jr., but her relationship to Mary Smith was not established. Does Irene Smith have a competing wrongful death claim?<sup>17</sup> If not, can Irene Smith compel the estate to file a survivor claim?
- Although the estate cannot bring a wrongful death claim, it may have other recourse.<sup>18</sup> Does Ramunno intend to pursue a survivor action on behalf of the estate?
- Did Ramunno discuss with Roblisha whether she was required to open an estate or whether she was financially liable for the estate?
- Did Ramunno perform a thorough investigation to determine what had been

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<sup>16</sup> 10 *Del. C.* § 3701 is entitled “Causes of actions generally” and states in pertinent part “All causes of action . . . shall survive to and against the executors or administrators of the person to, or against whom, the cause of action accrued. Accordingly, all actions, so surviving, may be instituted or prosecuted by or against the executors or administrators of the person to or against whom the cause of action accrued.”

<sup>17</sup> 10 *Del. C.* § 3724 is entitled “Action for wrongful death” and states in pertinent part “[a]n action under this subchapter shall be for the benefit of the spouse, parent, child and siblings of the deceased person.”

<sup>18</sup> 10 *Del. C.* § 3701.

accomplished by Roblisha Smith's prior representation?<sup>19</sup>

- Roblisha Smith appears to be making inconsistent decisions in that she retained Potter without opening an estate, and subsequently retained Ramunno to open an estate.

This motion is not ripe for resolution. The inability of the parties to agree to alternate methods of dispute resolution, methods recommended by the Delaware Lawyers' Rules of Professional Conduct to resolve disputes between attorneys,<sup>20</sup> is most unfortunate.

### CONCLUSION

This case is indeed troublesome for all parties, including this Court. Attorneys on both sides have indirectly accused the other side of inappropriate conduct which causes the Court to make inquiries. The insinuations by the parties raise the specter of multiple violations of the Delaware Lawyers' Rules of Professional Conduct. Each party has alluded to acts that, among other things, question the competency of representation, communication with the client, and reasonableness of fees. At the moment, these recriminations fall short of accusations; however, they will necessarily

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<sup>19</sup> It is incumbent upon the subsequent attorney to determine what has been accomplished by the discharged attorney and to determine fees paid. The Court finds it incredulous that no investigation was completed in either instance to determine the scope of the previous contract or the amount of work done by the discharged attorney.

<sup>20</sup> Del. Lawyer's R. Prof'l Conduct 1.5, cmt. 14 states "[i]f a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it."

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be developed at trial.

Based on the foregoing, the Court lacks sufficient information to dismiss the complaint. It cannot be said that Ramunno's complaint clearly lacks factual or legal merit. Thus, the Defendants' motion to dismiss is **DENIED**.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.  
Resident Judge

WLW/dmh